77-2134

No.

In the Supreme Court of the United States

October Term, 1977

Glenn E. Bandelin, Petitioner,

vs.

L. E. Pietsch, Sandpoint News-Bulletin, Inc.;
Morgan Monroe, Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Idaho

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August 2, 1977

SUBJECT INDEX

TABLE OF CASES, TEXTBOOKS
AND STATUTES

In the Supreme Court of the United States

October Term, 1977

No. _____

Glenn E. Bandelin, Petitioner,

vs.

L. E. Pietsch; Sandpoint News-Bulletin, Inc.; Morgan Monroe, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

GLENN E. BANDELIN, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Idaho entered in the above-entitled case on May 13, 1977.

Opinions Below

The opinion of the Supreme Court of Idaho was entered March 14, 1977, is reported at 563 P. 2d 395 and is printed in Appendix A hereto, infra, page 16.

The Judgment of Dismissal of the District Court

of the First Judicial District of the State of Idaho, in and for the County of Bonner was entered April 16, 1975, and is printed in Appendix A, hereto, infra, page 27. The Findings of Fact and Conclusions of Law of the Judge of said District Court are printed in Appendix A, hereto, infra, p. 28. The Order denying Appellant's Petition for rehearing was entered May 13, 1977, and is printed in Appendix A, hereto, infra, p. 39. The Order denying pending motions for attorneys' fees (by respondents) and for permission to make discovery (by appellant) was entered May 20, 1977, and is printed in Appendix A, hereto, infra, p. 40.

Jurisdiction

The Judgment (Opinion) of the Supreme Court of Idaho (Appendix A, infra, p. 16) was entered on March 14, 1977. A timely petition for rehearing was denied on May 13, 1977 (Appendix A, infra, p. 39). The jurisdiction of the Court is invoked under Rule 19.1. (a) of the Revised Rules of the Supreme Court of the United States; 28 USCS, Sec. 1257 (3); and Article 3, Section 2, page 1 of the Constitution of the United States.

Questions Presented

1. Does the "actual" malice test as defined in New York Times v. Sullivan apply to an attorney-guardian (i.e., is an attorney-guardian a public official or a public figure)?

2. Should the court or the jury determine whether an attorney-guardian is a public figure?

3. If the "actual" malice test does apply to an attorney-guardian, should the determination of "actual" malice be made by the jury, or by the trial court on a motion for summary judgment?

4. If the determination of whether an attorney-guardian is a public official, public figure or private person is to be determined by the trial court, is the attorney-guardian a private person as a matter of law?

5. Can "actual" malice be legitimately found by a jury under a fact situation wherein a weekly newspaper for thirteen successive weeks publishes front page tabloid-type articles about an attorney-guardian as well as libelling him, when prior to such situation that newspaper had never given more than one issue play of even such major events as local murders?

Statute Involved

1. United States Constiution, Amendment 1:

"Congress shall make no law respecting an establishment of religion, or prohibit the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

2. United States Constitution, Amendment 9:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

3. United States Constitution, Amendment 14, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of Facts

This action arose from a series of fourteen successive publications in a weekly newspaper of headline articles that invaded petitioner's right of privacy and also libelled him. The right of privacy issue is founded upon the newspaper's act of placing petitioner in a false light in the public eye. As defendants, petitioner named the corporate owners (Sandpoint News-Bulletin, Inc.), the publisher and principal stockholder (L. E. Pietsch), and the managing editor who authored the articles (Morgan Monroe).

The articles arose from a fact situation based upon petitioner acting in his capacity as an attorney at law.

Petitioner was an attorney in his sixties with some thirty years' experience. His only major public service was a state senator early in his career. His law practice was generally of a low profile type.

Petitioner was the attorney for and a personal friend of an elderly lady. She became incompetent, and petitioner was designated her guardian. While the guardianship was proceeding, the lady died. At this point petitioner became attorney for the estate.

Contending there were errors in handling the guardianship, an heir objected to the final accounting

of the guardianship. After a hearing, the court noted that while there were no fiscal shenanigans imputable to petitioner, petitioner's failure to strictly follow Idaho procedure probably amounted to contempt of court. Therefore, the court instructed that contempt charges be brought against petitioner. The Idaho Supreme Court reversed a court finding of guilt for contempt in Bandelin v. Quinlan, 1972, 94 Idaho 858, 499 P. 2d 557. Interestingly, in 1971, the State of Idaho adopted the Uniform Probate Code which, had it been in effect in 1970, would have permitted the conduct the trial court felt was objectionable (Idaho Session Laws, 1971, Chapter 111, page 233).

While the hearings on the accounting and on the contempt charge were going on, the respondents gave front page coverage to the matter.

Respondents had never, heretofore, given more than perfunctory reports of even murder cases. Respondent newspaper was a weekly and for years had dominated the media image in the community. Thus, the community was attuned to light media coverage of judicial proceedings.

Suddenly, respondents each week burst upon the readers front page headlines and stories when even the most trivial matter occurred relative to the problem, e.g., appointment of a different judge to hear one phase of the issue.

The newspaper's customary conservative approach in news presentation was maintained on all other stories in each issue; but in dealing with petitioner the presentation was tabloid style.

During the weekly presentation, defendants admittedly libelled petitioner at least twice, and contended an information source was a district judge when in fact it would have been impossible to interview that judge at that time. One libel was a report that petitioner had been convicted when he had not.

The reports were also repetitiously flavored with interest-whetting phrases like "Puzzling Talbot Case," "shaken" legal community, "rapid-fire developments," Mrs. Talbot declared incompetent by "Mrs. Sleep, whose former court was abolished earlier this year," "Mrs. Talbot's body had been cremated," the mortuary was "ordered not to release an obituary notice," and "now-defunct probate court." All of these phrases and others like them were used over and over in each successive report, even though the report covered only accounting matters and court motions - - - never charges of hiding bodies or attempting to rob estates.

Because he was, himself, before the court, petitioner was unable to publicly respond; he could only make his presentation to the court.

Respondent Monroe obtained great experience as a reporter of judicial matters when he worked in other areas.

Over and over again, week in and week out, respondents repeated the story with all the suppositions, innuendos and libels. Each story was emblazoned with huge headlines, usually on the front page, with each story normally being several columns in length. This would be so, even if the only new event during the week was a note in the case file saying a hearing was being "continued to a later date."

No other area media gave any kind of substantial coverage to this matter.

As a result of the libels by respondents and also because respondents held petitioner before the public in a false light, petitioner filed this action. Subsequently under date of May, 1974, Respondents filed a Motion for Summary Judgment contending ". . . said publications were privileged under the First and Fourteenth Amendments to the United States Constitution" which motion is printed in Appendix A, hereto, infra, p. 41. The Trial Court responded by granting the motion and stating in the Conclusions of law (Appendix A., page 37):

1.

"The newspaper publications complained of concerned a court proceeding, a public figure, and a matter of public concern, and

therefore, were entitled to the protection of The First Amendment of the Constitution of the United States."

2.

"Plaintiff has produced no evidence that any false statement was published with knowledge of its falsity or with reckless disregard of the truth."

3.

"Plaintiff has produced no evidence that defendants published any false information concerning the plaintiff which constituted an unwarranted invasion of his right to privacy."

4.

"There is no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law."

The Supreme Court of Idaho then affirmed the action of the trial court and outlined the issues as follows (563 P. 2d at p. 397) (Appendix A., p. 18):

"Two issues are raised on appeal. First, were the allegedly defamatory newspaper publications privileged under the First Amendment. Second, assuming that the publications were privilieged, were there disputed issues of material fact as to the existence of malice that should have been submitted to a jury."

Reasons for Granting this Writ

I.

Private Person

The Supreme Court of Idaho has decided this case in a way probably not in accord with applicable decisions of this court. That Court acknowledged (563 P. 2d 395 @ 397) that both Gertz v. Welch, 418 U. S. 323, 94 S.Ct. 2997, 41 L.Ed 2d 789 (1974) and Time v. Firestone, 424 U. S. 448, 96 S. Ct. 958, 47 L. Ed 2d 154 (1976) held:

> 1. There is no privilege given the media to libel or invade the right of privacy of a private individual even where the issue involves matters of public and general concern.
>
> 2. Reports of judicial proceedings are not priviliged a priori.

The Idaho Court did then, however, proceed to find petitioner to be a public figure because as guardian, he " . . . was the center of the controversy that gave rise to the Sandpoint News-Bulletin's publications." (p. 398). This conflicts with the "clear evidence" rule announced in the Gertz case, 418 U. S. at 352, 41 L. Ed. 2d 789, 94 S. Ct. 2997. It also conflicts with the Gertz comments (418 U. S. at 344, 41 L. Ed 2d 789, 94 S. Ct. 2997) noting that one criteria in concluding one to be a public figure or public

official is his "greater access to the channels of effective communication." Additionally, this finding conflicts with both Gertz and Firestone by resurrecting the theory that one is a public figure automatically if he was embroiled in a controversy of interest to the public. (Firestone, 424 U. S. at 454, 47 L. Ed 2d 154, 96 S. Ct. 958; Gertz, 418 U. S. at 346, 41 L. Ed. 2d 789, 94 S. Ct. 2997).

II.

Actual Malice and a Jury

> "In ruling on a motion for summary judgment a trial court's sole inquiry is whether such (genuine) issues exist; a trial court should not resolve any existing factual issues." (563 P. 2d at p 399.)

The Idaho Supreme Court made that statement and then promptly approved the trial court action of itself deciding the fact issue of actual malice. The Idaho Court (563 P. 2d 399) held that because of Time, Inc. v. Pape, 401 U. S. 279, 91 S. Ct. 633, 28 L. Ed 2d 45 (1971), a reporter's published mistake or misinterpretation cannot be a material fact issue because such an error, alone, could not sustain a jury finding of actual malice. However, without discussion to distinguish, the Idaho Court concedes that it perceives the Firestone case to be contra (563 P. 2d 399). At the same time, the Idaho Supreme Court failed to acknowledge all errors in the news reports and re-

fused to permit accumulation of admitted libellous statements with "false light" presentations for the purpose of ascertaining the existence of "actual" malice.

While failing to permit such an accumulation, the Idaho Supreme Court acknowledged (563 P. 2d 400), "Although it is conceivable that the character and content of a publication could be so patently defamatory that a jury could infer a knowing state of mind on this basis alone, no case has so held." Having acknowledged fact issues go to the jury, the Idaho court found no fact issue of "actual" malice for the erroneous reporting even in the face of the challenge to the reporter's veracity. The key to the conclusions he wrote was his research. He testified that he founded those conclusions upon interviews with a district judge and several attorneys. The attorneys denied the statements attributed to them; and the district judge not only denied the statements, but also denied the interview as claimed by the reporter (Appendix A. infra, p. 25).

This action by the Idaho Court is contrary to Firestone which said that some fact finder must make a "conscious determination of the existence or non-existence of the critical fact" (424 U. S. at 463, 47 L. Ed 2d 154, 96 S. Ct. 958), and in Idaho, the fact finder is the jury.

In essence, what respondents did in this case

was take a charge of contempt and deliberately destroy a person by reporting around it. The "charge" was converted to "conviction." The alleged ground for the charge was changed from sloppy handling to contempt of court order. The presentation was to leave petitioner in a cloud of suspicion as to his ethics as a lawyer.

The overall effect of writing articles in a manner never done before; of blowing the contempt charge way out of proportion to its importance; and associating the "charge" with a cremation of the body of a little-known old lady of means, abolished courts, and shaken bar was to convince the public that petitioner would and did find means to appropriate a client's assets to himself.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,
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August 2, 1977

APPENDIX "A"

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In the Supreme Court of the State of Idaho

No. 11953

GLENN E. BANDELIN,
Plaintiff-Appellant,

v.

L. E. PIETSCH; SANDPOINT NEWS-BULLETIN, INC.; MORGAN MONROE,
Defendants-Respondents.

Coeur d'Alene, October Term, 1976

Filed Mar. 14, 1977
R. H. Young, Clerk

Appeal from the District Court of the First Judicial District of the State of Idaho, Bonner County. Hon. Roy E. Mossman, District Judge.

Appeal from district court granting of summary judgment in libel action. Affirmed.

Peter B. Wilson, of Wilson & Walter, Bonners Ferry, for appellant.

Piatt Hull, of Hull, Hull & Wheeler, Wallace, and Fred W. Gilbert, of Hamblen, Gilbert & Brooke, P. S., Spokane, Washington, for respondents.

DONALDSON, J.

This case is an action for libel and invasion of privacy. Plaintiff-appellant Glenn Bandelin appeals from a grant of summary judgment. Glenn E. Bandelin is a North Idaho attorney and is also a former

office holder in the state legislature. On December 19, 1968, the probate court of Bonner County appointed him guardian of the person and estate of one Muriel I. Talbot who had been found incompetent on the same date. She died on January 2, 1970. Bandelin did not initiate proceedings for a final accounting until March 25, 1971. At that time, the district court concluded that Bandelin's management of the estate had been negligent in the extreme and ordered the prosecuting attorney of Bonner County to initiate contempt proceedings against him.

Over a period of several months, the Sandpoint News-Bulletin reported the ensuing legal proceedings. Accounts of the proceedings occurred in eleven consecutive editions of the Sandpoint News-Bulletin. There were seventeen publications in toto. These accounts gave rise to Bandelin's allegations of libel and invasion of privacy. He claims that the accounts contained misstatements of fact and that they were deliberately repetitious.

From the record it appears that misstatements appeared in the August 19 and August 26 editions of the Sandpoint News-Bulletin. The August 19 edition referred to two Sandpoint attorneys "judged in contempt of a district court decision and order concerning their handling of the guardianship and estate of the late Mrs. Muriel Talbot." At a later point in the article they were cited by name. In the August 26 edition the same misstatement is made twice. Although plaintiff was later judged in contempt by the district court (a conviction that was overturned by the Idaho Supreme Court on procedural grounds), at the time the above accounts were written his case had not come to trial and hence he had not yet been adjudged in contempt. The Sandpoint News-Bulletin

did accurately report future developments in the case —Bandelin's conviction, the appeal that followed and the Supreme Court's reversal of the lower court's decision, but it never made a retraction of the earlier misstatements.

Bandelin brought a libel action along with an invasion of privacy action against the Sandpoint News-Bulletin, as well as its editor, L. E. Pietsch, and the reporter responsible for the allegedly defamatory publications, Morgan Monroe. After extensive discovery, the Sandpoint News-Bulletin moved for summary judgment. The district court, after examining the record as well as supplementary briefs and affidavits, granted the Sandpoint News-Bulletin's motion. This appeal followed.

Two issues are raised on appeal. First, were the allegedly defamatory publications privileged under the first amendment. Second, assuming that the publications were privileged, were there disputed issues of material fact as to the existence of malice that should have been submitted to a jury. In short, was Sandpoint News-Bulletin's motion for summary judgment providently granted.

We will address the issue of privilege first, but before doing so, we will briefly delineate the relevant legal principles on which this case must be resolved.

Ever since New York Times Co. vs. Sullivan, 376 U. S. 254. (1964) was decided, the Supreme Court has been grappling with the problem of reconciling the demands of the first amendment freedom of the press with the law of libel and invasion of privacy. New York Times and its progeny place a heavy burden on a libel plaintiff. If a communication is constitutionally privileged under New York Times, a plaintiff can

recover only if he can prove malice on the part of the publisher, with malice being defined as knowledge of falsity or reckless disregard of truth. New York Times, supra. Although reckless disregard bears a superficial resemblance to gross negligence, the Supreme Court has interpreted it to mean much more. In St. Adamant v. Thompson, 390 U. S. 727, 731 (1968), with only Justice Fortas dissenting, the Court reversed a judgment for the plaintiff because nothing in the record established that the defendant had a conscious awareness of probable falsity. In addition. the Court has replaced the "preponderance of evidence" standard of proof, generally applicable in civil cases, with the more demanding standard of "clear and convincing" evidence. Rosenbloom v. Metromedia, Inc., 403 U. S. 29, 52 (1971). These same principles have also been applied to actions for invasion of privacy. Time, Inc. v. Hill, 385 U. S. 374 (1967).

The protection accorded the first amendment reached a high water mark in Rosenbloom. Not only did that decision give constitutionally privileged communications the benefit of a more demanding standard of proof, a plurality applied the Times privilege to a private individual's involvement in a matter of public or general concern. Prior to Rosenbloom, the privilege had been confined to publications concerning public officials or public figures. In Gertz v. Welch, 418 U. S. 323 (1974), the tension that necessarily exists between the need for a robust press and the competing societal interest in preserving the integrity of an individual's reputation resulted in a retrenchment of the Court's interpretation of first amendment rights. The battleground was the threshhold issue of privilege. The majority in Gertz rejected the contention of the plurality in Rosenbloom that

publications involving matters of public and general concern enjoyed a constitutional privilege even when they involved private individuals. The issue was raised again in Time, Inc. v. Firestone, 96 S. Ct. 958 (1976) at which time the Court affirmed its holding in Gertz, stating explicitly that reports of judicial proceedings were not privileged a priori.

Appellant Bandelin cites Gertz and Firestone and argues on this basis that respondents' communications were not constitutionally privileged. We cannot agree. Although Gertz and Firestone narrowed the area of first amendment protection in libel and presumably in invasion of privacy actions, nothing in either case affected prior court decisions regarding privileged communications that involved public officials or public figures. The district court found that the reports of the Sandpoint News-Bulletin were privileged in that they were reports about a public figure. We agree.

The United States Supreme Court in Gertz said that the designation of a public figure may rest on two alternative bases:

> "In some instances an individual may achieve such persuasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.'" 418 U. S. at 351

A review of the record reveals that Bandelin was prominent in the local politics of Bonner County, had been a representative in the state legislature, was a

leading attorney, and was well known throughout the county. Counsel for Bandelin argues, however, that in recent years Bandelin's public role has subsided—that he has reverted to the "simple small-town lawyer he was before he gained notoriety." We concede that a public figure can revert back to the "lawful and unexciting life lead by the great bulk of the community." Prosser, Law of Torts, @ 107 (1st ed. 1941.) But it is far more common that a public figure will retain residual elements of his former status even when he returns to private life.

However, we do not affirm the district court's decision exclusively on the prominence that Bandelin enjoyed in the local community. We are sensitive to the consequences of being a public figure and we do not assume that a citizen's participation in community and professional affairs automatically renders him a public figure. We follow the approach of the Supreme Court in Gertz:

> "It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation (or invasion of privacy)." 418 U. S. at 352.

In the present case, Bandelin as the guardian of the estate of Murial I. Talbot was the center of the controversy that gave rise to the Sandpoint News-Bulletin's publications. The Sandpoint News-Bulletin initiated its coverage of the Talbot case when it became aware of the trial judge's criticism of Bandelin's handling of the Talbot guardianship. Under such circumstances, Bandelin cannot maintain that he is not a public figure and was just an attorney

handling the probate affairs of a client. He was rather the court appointed guardian, a pivotal figure in the controversy regarding the accounting of the estate that gave rise to the defamation and invasion of privacy actions.

The fact that after a period of active involvement in the political and social affairs of Bonner County, Bandelin desired the personal anonymity of a private citizen, does not make him a private figure for first amendment purposes. Public figure status does not hinge upon an individual's preference in the matter. In most cases, a public figure will have become such by the active pursuit of the limelight, but the Times privilege is not precluded because an individual does not voluntarily pursue public acclaim. The privilege is based upon a value judgment that debate on public issues should be uninhibited. That judgment is applicable to both the individual who becomes embroiled in a public controversy through no effort of his own and the individual who actively generates controversy—both abdicate their anonymity.

Since the Sandpoint News-Bulletin's coverage of Bandelin's role in the Talbot case was constitutionally privileged, in order to recover on his libel and invasion of privacy action, Bandelin had to show that the publications were made with malice. We come then to the major issue which Bandelin raises on appeal—whether there were disputed issues of fact as to the existence of malice which should have been submitted to a jury.

The purpose of summary judgment is to avoid useless trials. When there are no genuine issues of material fact and a party is entitled to judgment as a matter of law, a trial court is justified in denying a

trial on the merits. When there are issues of material fact, however, a trial is essential. In ruling on a motion for summary judgment a trial court's sole inquiry is whether such issues exist; a trial court should not resolve any existing factual issues.

These principles are so well engrained in the law that they require no citation. They apply to first amendment cases as well as less august legal questions. Although courts have said that serious problems will be created for free speech and free press if unwarranted law suits are allowed to proceed to trial this solicitude for first amendment freedoms was not intended to abrogate the fundamental rules governing the administration of summary judgment. When first amendment rights are involved, courts should carefully distinguish between what are only formal allegations and what are substantial factual disputes. Whether summary judgment should be granted, however, is determined on the same basis—is there a genuine issue of material fact? In making that determination courts are required to view the evidence in the light most favorable to the party against whom the motion for summary judgment is made and to draw all inferences in his favor.

The first amendment is not without its protection in summary judgment, however. The manner in which a court must examine the evidence in determining whether there is a disputed issue of material fact is the same as in all other cases in which it is claimed that a case should not go to the jury. But the standard against which the evidence must be examined is that of New York Times. When a defendant's communications are constitutionally privileged, a plaintiff cannot prevail at trial unless he establishes malice with convincing clarity. This is the standard

against which the court must examine the evidence on motion for summary judgment because this is the standard to determine materiality of disputed questions of fact. Unless there is evidence which if believed by a jury would establish malice clearly and convincingly, a defendant is entitled to summary judgment. Disputed issues of fact that if resolved in favor of the plaintiff should still fall short of establishing malice with convincing clarity are not material. Bon Air Hotel, Inc. v. Time, 426 F. 2d 858 (5th Cir. 1974); Time Inc. v. Milaney, 406 F. 2d 565 (5th Cir. 1969); Guam Federation of Teachers v. Ysrael, 492 F. 2d 438 (9th Cir. 1974); Cervantes v. Time, Inc. 464 F. 2d 986 (8th Cir. 1972).

Applying these principles to the present case, we agree with the district court that summary judgment should have been granted. Even viewing the evidence most favorably to Bandelin and giving him the benefit of all proper inferences, there is no evidence that shows with convincing clarity that the Sandpoint News-Bulletin acted with malice. The only errors appearing in the report were two statements that Bandelin had been judged in contempt when his case had not yet come to trial. The Supreme Court of the United States found that a reporter's failure to differentiate between allegations in a complaint and proven fact is not sufficient to sustain a jury finding of actual malice. Time, Inc. v. Pape, 401 U. S. 279 (1971). But see Time, Inc. v. Firestone, supra. Like Morgan Monroe, the reporter in this case, the reporter in Pape professed some familiarity with legal concepts. The Supreme Court based its conclusion on the fact that the alleged libel in Pape arose from a misinterpretation of an ambiguous document. The district court's order directing the prosecuting attorney of Bonner

County to initiate contempt proceedings against Bandelin was equally ambiguous. Malice cannot be predicated exclusively on misstatements having their genesis in an ambiguous document.

Bandelin also relies on the tone of the articles to sustain his claim that summary judgment was improvidently granted. The articles were evocative. Phrases such as the "puzzling Talbot case," "rapid-fire developments," "shaken Bonner County legal community" blemish the articles. We do not applaud the Sandpoint News-Bulletin's journalism. It was unjustifiably sensational. However, the tone of the articles, even when considered with the other evidence presented in the case, does not establish malice with convincing clarity. Malice is defined for first amendment purposes as knowledge of falsity or reckless disregard of truth. Its essence is a knowing state of mind on the part of the publisher. Although it is conceivable that the character and content of a publication could be so patently defamatory that a jury could infer a knowing state of mind on this basis alone, no case has so held. The argument was rejected on its facts in New York Times v. Sullivan, supra, and Washington Post Co. v. Keogh, 355 F. 2d 965 (D. C. Cir. 1966). The alleged libel in the present caes is much less serious than that in New York Times and Washington Post. Moreover, when both cases were decided, malice could still be proved by a mere preponderance of the evidence. We therefore decline to deviate from th results reached in New York Times and Washington Post.

Bandelin contends that the repetition of the news stories together with their misstatements and tone raise sufficient evidence of malice to justify submitting the question to a jury. The record establishes

beyond factual dispute that the Talbot case was a continuing story—each of the articles was justified by a new development in the case. Morgan Monroe testified that standard journalism procedure is to summarize preceding developments in a continuing story, the assumption being that readers have not read the prior stories. Monroe's testimony is not challenged by any evidence to the contrary. We also take notice of the fact that the Sandpoint News-Bulletin is a weekly newspaper. When a paper is not published daily, it may be more important to repeat what transpired previously so that readers will understand the latest developments in a story.

Bandelin has not introduced any other evidence of malice. What he has introduced even if accepted by a jury would not establish malice under the less demanding preponderance of evidence standard. It falls far short of establishing malice with convincing clarity.

Judgment affirmed. Costs to respondents.

McFADDEN, C. J., SHEPARD and BAKES, J. J., and SCOGGIN, D. J., retired, concur.

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

GLENN E. BANDELIN, Plaintiff, vs. L. E. PIETSCH, SANDPOINT NEWS-BULLETIN, INC.; MORGAN MONROE, Defendants.	No. 12055 JUDGMENT OF DISMISSAL

This matter came on for hearing before the Honorable Roy E. Mosman, District Judge, upon Defendants' Motion for Summary Judgment on December 12, 1974, and March 21, 1975, and the parties being represented by their attorneys of record and the Court having received evidence and the parties having submitted briefs and oral argument, and the Court being duly advised and having entered Findings of Fact and Conclusions of Law,

NOW, THEREFORE, pursuant to said Findings and Conclusions, Defendants' Motion for Summary Judgment is hereby granted and it is hereby ordered that plaintiff's Complaint be and the same is hereby dismissd with prejudice and it is further ordered that defendants shall recover their costs incurred herein.

s/ROY E. MOSMAN, Judge

Presented by:
Piatt Hull,
Attorney for Defendants.

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

GLENN E. BANDELIN,
Plaintiff,

vs.

L. E. PIETSCH; SANDPOINT NEWS-BULLETIN, INC.. MORGAN MONROE,
Defendants.

No. 12055

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for hearing before The Honorable Roy E. Mosman, District Judge, upon Defendants' Motion for Summary Judgment on December 12, 1974, and the plaintiff being represented by his attorneys, Stephen Bistline and Peter B. Wilson, and defendants being represented by their attorneys, Fred W. Gilbert and Piatt Hull, and the Court having received in evidence for the purpose of the Motion for Summary Judgment affidavits submitted in support of and in opposition to said motion, depositions of the parties, and portions of the Court files and transcripts of proceedings in this Court in the Matter of the Guardianship of Muriel I. Talbot, an incompetent, No. 10961, and in the Matter of the Estate of Muriel I. Talbot, deceased, No. 10885, and in the Matter of Glenn E. Bandelin and Stephen Bistline, No. 11384, and the Court having considered said evidence, the pleadings, the Motion for Summary Judgment, the briefs submitted, and having heard the

argument of counsel and the matter having been continued to give the parties additional time to submit further evidence and briefs; and the parties having submitted further affidavits and briefs, and the matter having brought on again for further oral argument on March 21, 1975, and having been submitted to the Court for decision,

NOW, THEREFORE, the Court hereby makes the following Findings of Fact:

FINDINGS OF FACT

1.

The facts set forth herein are not disputed except where specially noted.

2.

The defendant, Morgan Monroe, was a highly competent, experienced and trusted reporter and editorial writer for the Sandpoint News-Bulletin, a weekly newspaper published in Sandpoint, Idaho. Among his many other reporting duties, Mr. Monroe had the responsibility of covering activities in the Court of Bonner County. During a routine check of court filings on August 6, 1971, he came across a memorandum decision and order entered by The Honorable James G. Towles, Judge of the District Court for Bonner County, in the Matter of the Guardianship of Muriel I. Talbot, Incompetent. This memorandum decision and order covered matters which were then entirely unknown to Mr. Monroe and contained recitals of fact which were considered by him to be shocking and highly newsworthy because they concerned a prominent attorney and politician and his malfeasance in the conduct of a public office. The order revealed these facts:

A. On December 19, 1968, Muriel I. Talbot had been found by the Probate Court to be incompetent. On the same date, plaintiff, Glenn E. Bandelin, was appointed guardian of her person and estate. The Court found that Mr. Bandelin had failed to carry out many of the duties required of a guardian and had done a number of things entirely without authority from the Court. He found that the guardian had sold assets of the estate without making return of sale or securing confirmation. He had sold other assets of the estate without any proceedings to secure Court approval or authority or confirmation. The guardian failed to file an inventory of the assets of the estate or cause the same to be appraised until after the same was due and after a direct order to do so from the Court. The ward died and thereafter the guardian failed to file a proper final account. The guardian paid himself fees without authorization from the Court. The guardian loaned assets of the estate to a friend without proper authorization from the Court. Many other deficiencies in the handling of the guardianship were specifically noted.

B. The Court went on to order the guardian either to deliver all the assets of the guardianship to the Clerk of the Court or to post a bond in the amount of $100,000.00 within five days. He also ordered the guardian to render a full and final accounting within ten days, together with an inventory and appraisal. Finally he ordered the Prosecuting Attorney of Bonner County to initiate contempt proceedings against Glenn E. Bandelin, the guardian.

3.

The memorandum decision and order of Judge Towles was followed by the filing of an affidavit of

the Prosecuting Attorney, Everett D. Hofmeister, dated August 2, 1971, stating the following:

> "That as shows of record in the memorandum decision, hereinbefore referred to, the said Glenn E. Bandelin and Stephen Bistline did act and omit to act with respect to matters pending before the Court and did willfully neglect and violate their duties as attorneys, and the said Glenn E. Bandelin did willfully neglect and violate his duties as guardian of an estate, the details of which are more fully set forth in the aforementioned proceedings referred to herein.
>
> "That Glenn E. Bandelin and Stephen Bistline are licensed and practicing attorneys of the State of Idaho and did jointly and, or, severally interfere with and obstruct the purposes of the proceedings of the Court which constitutes contempt of the authority of the Court as defined in Idaho Code 7-601."

4.

Based upon the affidavit of Prosecuting Attorney Hofmeister, The Honorable Watt E. Prather, Judge of the District Court of Bonner County, entered an order to show cause dated August 4, 1971, as follows:

> "Upon the reading and filing of the affidavit of the Prosecuting Attorney of Bonner County herein and upon reading of the memorandum decision and order of the Honorable James G. Towles in Bonner County Case No. 10961 dated July 27, 1971, and the review of Bonner County Case No. 10961 and Bonner County Case No. 10885,

from which it appears that the said Glenn E. Bandelin and Stephen Bistline did act and omit to act with respect to proceedings in said cases in contempt of the authority of the Court, ..."

Judge Prather's order then went on as follows:

> "It is hereby ordered that you, Glenn E. Bandelin and Stephen Bistline, appear before the above entitled Court - - - - to show cause why you should not be adjudged guilty of and punished for contempt of Court by reason of the evidence shown in Bonner County Case No. 10961."

5.

Based upon what he found in the Court files and the foregoing orders, Mr. Monroe wrote a story for the Sandpoint News-Bulletin which was published in the issue of August 12, 1971, the lead sentence of which starts out:

> "Two Sandpoint attorneys have been ordered to show cause why are not in contempt of the authority of the District Court . . . ."

The story then quoted directly from the order of Judge Prather as follows:

> "The order states that Bandelin and Bistline 'did act and omit to act with respect to proceedings in said cases in contempt of the authority of the Court.' "

The story then went on to give many details concerning the guardianship proceedings and the order of Judge Towles.

6.

On August 19, 1971, a further story was published reporting that George Antonson had been arrested and charged with embezzling assets of the estate which had been delivered to him. The story also reviewed additional provisions of the orders of Judge Towles and Judge Prather and stated:

> "The case involves, among others, two Sandpoint attorneys judged in contempt of a District Court decision and order concerning their handling of the guardianship."

The next sentence in the story states:

> "Both attorneys have been ordered to appear and show cause before District Court Judge Watt E. Prather in Sandpoint, September 21, at 9:30 a.m."

This story was followed by another one August 26, 1971, reporting a second charge of embezzlement against George Antonson and summarizing the information which had been previously published.

7.

Thereafter the newspaper reported to its readers various events as they transpired. Attorneys for Bandelin attempted to have Judge Towles revoke his order of July 27th and to declare himself incompetent to hear the case by virtue of personal prejudice. The denial of this motion was appealed to the Supreme Court of the State of Idaho and in the meantime the hearing on the motion to show cause was continued to a date in September, when it was to be heard before an outside Judge, Judge Quinlan of Lewiston, Idaho. The hearing was again continued

to October 15th and after a full hearing before Judge Quinlan, Judge Quinlan found Bandelin guilty of contempt as charged. This order was also appealed to the Supreme Court of the State of Idaho and eventually was set aside by that Court on the ground that the District Court lacked jurisdiction because the charges against Mr. Bandelin were not sufficiently specific. All of these proceedings were thoroughly reported in the Sandpoint News-Bulletin over a period of many months.

8.

Plaintiff contends that these stories contained certain statements which were untrue and were defamatory to plaintiff and constituted an unlawful invasion of the plaintiff's right to privacy. Defendants contend that any statements published which were not true were published without knowledge that they were untrue and without any reckless disregard of the truth.

9.

The only untrue statement contained in the publications which has been pointed out to the Court and which the Court finds could be considered to be defamatory is the statement set forth in Finding No. 6 above contained in the newspaper publications of August 19 and August 26, 1971, to the effect that plaintiff had been judged in contempt of a District Court decision. It is admitted that this statement was not true in that plaintiff had not been adjudged in contempt in the legal sense of the word, but had only been ordered to be charged with contempt.

10.

The Court finds that the language of the memorandum decision of July 27, 1971, gave ample reason

for anyone reading it to conclude that Judge Towles had found that acts constituting contempt had been committed by Mr. Bandelin. This was the conclusion reached by Mr. Monroe and it was shared by Mr. Pietsch and published for two successive issues in the newspaper. In the very same stories it was also pointed out that Bandelin was being ordered to appear and show cause why he should not be punished for contempt, thus making it clear that he had not yet been convicted. The Court further finds that there was understandable confusion in the mind of Mr. Monroe and others as to the exact meaning of Judge Towles' decision. Mr. Monroe made extensive efforts to resolve this confusion by questioning others, including attorneys in the area who were familiar with the case. There is some dispute as to what was said in these conversations, but no evidence has been presented to show that Morgan Monroe in fact knew or should have known that Bandelin had not been "found in contempt" when the above stories were published.

11.

In another hearing before Judge Towles on August 26, 1971, Attorney Nixon, representing Stephen Bistline, who was also a party to the contempt proceedings, clearly indicated to Judge Towles that he was of the opinion that Judge Towles had found both Bistline and Bandelin in contempt and the Court advised him, "I haven't found anybody in contempt." Mr. Monroe was present at this hearing and in the next issue of the newspaper reported to the readers just what Judge Towles had said and thereafter the newspaper never again repeated the statement that plaintiff had been found in contempt.

12.

The defendant, L. E. Pietsch, as owner and editor of the defendant newspaper, relied entirely upon Morgan Monroe to secure the information and write the stories published in the newspaper concerning this matter. He cautioned Mr. Monroe to handle the matter carefully and objectively and was aware of the efforts made by Mr. Monroe to learn the truth. The Court further finds that Mr. Pietsch did not learn that Judge Towles had not in fact found Bandelin in contempt until after the hearing before Judge Towles on August 26, after which Mr. Monroe reported to him what Judge Towles had said in open court on that occasion, and the next issue of the newspaper published the corrected facts.

13.

There is no evidence to establish that the defendants or any of them published any false statements concerning the plaintiff with knowledge that they were false or in reckless disregard of the truth.

14.

The newspaper articles were concerned solely with Mr. Bandelin's conduct as court appointed guardian of the estate of an incompetent person and with his having been charged with contempt for his improper handling of the guardianship proceedings and his trial upon those contempt charges.

15.

Plaintiff has been a resident of Bonner County all of his life and is well known throughout the County. He has been prominent in local politics and served this District in the State Legislature for a number of

years. As a practicing attorney for many years he has represented many residents of the County or members of their families.

16.

The matters which were published in the newspaper concerning the plaintiff were interesting and newsworthy and, since they dealt with the activities of a prominent attorney in the handling of a guardianship to which he had been appointed by the Court and the criticism of that handling by a District Judge and the resulting charges of contempt, they were matters of public concern.

17.

There is no evidence that defendants published any false information concerning plaintiff's private life, private activities or private capacity.

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1.

The newspaper publications complained of concerned a Court proceeding, a public official, a public figure, and a matter of public concern and, therefore, were entitled to the protection of the First Amendment of the Constitution of the Unied States.

2.

Plaintiff has produced no evidence that any false statement was published with knowledge of its falsity or with reckless disregard of the truth.

3.

Plaintiff has produced no evidence that defendants published any false information concerning the plaintiff which constituted an unwarranted invasion of his right to privacy.

4.

There is no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law.

DONE IN OPEN COURT this 15 day of April, 1975.

s/ROY E. MOSMAN, Judge.

Presented by:
Piatt Hull,
Attorney for Defendants.

SUPREME COURT — STATE OF IDAHO

Boise, Idaho

Peter J. Boyd
Elam, Burke, Jeppesen, Evans & Boyd
Attorneys at Law
Boise;

Peter B. Wilson
Wilson & Walter
Attorneys at Law
Bonners Ferry;

Piatt Hull
Hull & Hull
Attorneys at Law
Wallace;

Fred W. Gilbert
Hamblen, Gilbert & Brooke
Attorneys at Law
Spokane

SUPREME COURT No. 11953

May 13, 1977

L. E. PIETSCH; SANDPOINT NEWS-BULLETIN, Inc.; MORGAN MONROE,
Appellant,

v.

GLENN E. BANDELIN,
Respondents.

GENTLEMEN:

In the above entitled cause the Court has today denied Appellant's Petition for Rehearing. The Respondent's Motion for Attorney Fees and Appellant's Motion Requesting Permission to Submit Interrogatories, etc., are still under consideration.

R. H. YOUNG,
CLERK OF THE SUPREME COURT
STATE OF IDAHO

SUPREME COURT — STATE OF IDAHO

Boise, Idaho

Peter J. Boyd
Elam, Burke, Jeppesen, Evans & Boyd
Attorneys at Law
Boise;

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Attorneys at Law
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Piatt Hull
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Attorneys at Law
Wallace;

Fred W. Gilbert
Hamblen, Gilbert & Brooke
Attorneys at Law
Spokane

Supreme Court No. 11953

May 20, 1977

GLENN E. BANDELIN,
Appellant,

v.

L. E. PIETSCH; SANDPOINT NEWS-BULLETIN, Inc.; MORGAN MONROE,
Respondents.

GENTLEMEN

In the above entitled cause the Court has today denied Respondent's Motion for Attorney Fees and denied Appellant's Motion requesting permission to submit interrogatories, Notice to produce and request for admission to Respondents together with Request for permission to take deposition.

R. H. YOUNG

CLERK OF THE SUPREME COURT
STATE OF IDAHO

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

GLENN E. BANDELIN,
Plaintiff,

vs.

L. E. PIETSCH, SANDPOINT NEWS-BULLETIN, INC.; MORGAN MONROE,
Defendants.

No. 12055

MOTION FOR SUMMARY JUDGMENT

Come now the defendants above named, through their undersigned attorneys, and move for a summary judgment in their favor, pursuant to Rule 56 of the Rules of Civil Procedure, with respect to each issue of liability asserted in Plaintiff's Amended Complaint herein.

This motion is based on the pleadings filed herein and on the attached affidavits of Fred W. Gilbert and Morgan Monroe and Laurin Pietsch on file herein. Said pleadings, affidavits and depositions show that there is no genuine issue as to any material fact and that defendants are entitled to judgment in their favor as a matter of law, with respect to each question of liability. Said pleadings, affidavits and depositions further show that the matters published by defendants concerned the guardianship proceedings in the estate of Muriel I. Talbot, an incompetent, and plaintiff's acts as official guardian, which proceedings and acts were of an official public nature and of public concern and, therefore, said

publications were privileged under the First and Fourteenth Amendments to the United States Constitution.

DATED this ..... day of May, 1974.

HAMBLEN, GILBERT & BROOKE, P. S.
By s/ FRED W. GILBERT
Fred W. Gilbert
1215 Washington Mutual Building
Spokane, Washington 99201

HULL, HULL &WHEELER
By s/ PIATT HULL
Piatt Hull
P. O. Box 709
Wallace, Idaho 83873
Attorneys for Defendants.

IN THE SUPREME COURT OF THE
STATE OF IDAHO

GLENN E. BANDELIN,
Plaintiff and Appellant,
vs.
L. E. PIETSCH; SANDPOINT NEWS-BULLETIN, INC.; MORGAN MONROE,
Defendants and Respondents.

No. 11953

AFFIDAVIT

STATE OF IDAHO }
County of Boundary } ss.

DAR COGSWELL, being first duly sworn on oath, deposes and says:

I.

That affiant is the District Judge of the First Judicial District of the State of Idaho; that he has resident chambers in Sandpoint, Idaho; and that affiant is one and the same person as the affiant, Dar Cogswell in that affidavit in this cause dated December 9, 1974;

II.

That in said affidavit under paragraphs A through G, the month shown is "July," and that this

is a typographical error, and the month should read "August."

s/ DAR COGSWELL

SUBSCRIBED AND SWORN TO BEFORE ME THIS 13th day of April, 1977.

s/ DOUGLAS H. DAVIS
Notary Public for Idaho
Residing at Bonners Ferry
Com. Exp.:.

I hereby certify that a true and correct copy of the foregoing was mailed, regular mail, postage prepaid, to:

Piatt Hull, Esq.
P. O. Box 709
Wallace, Idaho 83873

Fred W. Gilbert, Esq.
1215 Washington Mutual Bldg.
Spokane, Washington, 99201

this 11th day of April, 1977.

s/BLANCHE STUDER

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

GLENN E. BANDELIN, Plaintiff, vs. L. E. PIETSCH, et al., Defendants. | Case No. 12055 | AFFIDAVIT OF DAR COGSWELL

STATE OF IDAHO } ss.
County of Bonner }

I, Dar Cogswell, being first duly sworn on oath, deposes and says:

I have read an excerpt of the transcribed oral deposition of Morgan Monroe that has been furnished to me by Mr. Bistline.

As I understand Mr. Morgan's deposition, the first article that appeared in the Sandpoint News-Bulletin concerning the Talbot Estate was published on Thursday, August 12, 1971; that prior to the second publication on August 19, 1971, Mr. Monroe alleges that he talked to me extensively concerning the Talbot case and that I used the phrase which he quoted in the second article as follows:

> "This is a puzzling case that has shaken the legal community in this area."

I have no recollection of making such a comment to Mr. Monroe. I have never represented myself as speaking for the "legal community." I had no indication of how the legal community felt concerning the Talbot Estate except that I know that the attorneys who represented Mr. Bandelin felt that no contempt charge had been made against him.

My recollection is further supported by my court minutes and travel expense vouchers which show that I could not have talked to Mr. Monroe between the first publication of the News Bulletin on August 12, 1971, and the second publication on August 19, 1971, for the reason that I was not available in my office in Sandpoint, Idaho, but that I was out of town performing court business as follows:

A. Thursday, July 12, 1971 - Coeur d'Alene, Idaho Judicial Conference - 8:00 A. M. to 5:00 P. M.

B. Friday, July 13, 1971 - Coeur d'Alene, Idaho Judicial Conference - 8:00 A. M. to 5:00 P. M.

C. Saturday, July 14, 1971 - Coeur d'Alene, Idaho Judicial Conference - 8:00 A. M. to 5:00 P. M.

D. Sunday, July 15, 1971 - At home in Sandpoint. I have never had a conversation with Mr. Monroe at my home concerning legal matters.

E. Monday, July 16, 1971 - Coeur d'Alene, Idaho Judicial Conference - 8:00 A. M. to 5:00 P. M.

F. Tuesday, July 17, 1971 - Wallace, Idaho Judicial Conference - 8:00 A. M. to 5:00 P. M.

G. Wednesday, July 18, 1971 - Bonners Ferry, Idaho Law Day - 8:30 A. M. to 5:00 P. M.

DATED this 9th day of December, 1974.

s/ DAR COGSWELL
Dar Cogswell

Sworn to subscribed before me this 9th day of December, 1974.

s/ DOUGLAS H. DAVIS
Douglas H. Davis, Notary Public in and for the State of Idaho.

No. 77–213

In the Supreme Court of the United States

October Term, 1977

Glenn E. Bandelin, Petitioner

v.

L. E. Pietsch, Sandpoint News-Bulletin, Inc.;
Morgan Monroe, Respondent

RESPONDENTS' BRIEF IN OPPOSITION
to Petition for Writ of Certiorari

HULL, HULL & WHEELER

HAMBLEN, GILBERT & BROOKE, P.S.
Fred W. Gilbert of Counsel
1215 Washington Mutual Building
Spokane, Washington 99201

Peter B. Wilson
WILSON & WALTER
Counsel for Petitioner,
Box 749
Bonners Ferry, Idaho 83805

August 30, 1977

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In the Supreme Court of the United States

October Term, 1977

Glenn E. Bandelin, Petitioner

v.

L. E. Pietsch, Sandpoint News-Bulletin, Inc.;
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Box 749
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August 30, 1977

SUBJECT INDEX

TABLE OF CASES

In the Supreme Court of the United States

October Term, 1977

No. 77–213

Glenn E. Bandelin, Petitioner,

v.

L. E. Pietsch; Sandpoint News-Bulletin, Inc.; Morgan Monroe Respondent.

RESPONDENTS' BRIEF IN OPPOSITION
to Petition for a Writ of Certiorari to
the Supreme Court of Idaho

COUNTER STATEMENT OF FACTS

We cannot accept Petitioner's Statement of Facts. Petitioner repeatedly makes ascertions which are not borne out by the record.

The Court found that Bandelin was prominent in the local politics of Bonner County, had been a representative in the State Legislature, was a leading attorney, and was well known throughout the county.

Bandelin was appointed guardian of the person and estate of an elderly client, Mrs. Talbot. Bandelin's handling of the guardianship was so grossly improper

that Judge Towles, on examining his purported accounting, rejected the accounting and ordered a new, full accounting to be filed in ten days, ordered Bandelin to post a bond in the amount of $100,000.00 and ordered the prosecuting attorney to initiate contempt proceedings against Bandelin.

The prosecuting attorney then filed an affidavit which stated that, based upon the order of Judge Towles, it appeared that Bandelin had wilfully neglected and violated his duties as guardian and had obstructed the proceedings of the Court "which constitutes contempt of the authority of the Court."

Next, Judge Prather issued an Order to Show Cause directed to Bandelin which stated that, from the order of Judge Towles, it appeared that Bandelin "did act and omit to act – in contempt of the authority of the Court."

The above mentioned Court proceedings were what initiated the report in the newspaper. These reports covered in considerable detail, not only the guardianship but also the contempt proceedings against Bandelin. None of the stories referred to Bandelin's acts as a private attorney or his private life.

Misstatements appeared in the second and third issues of the newspaper. They referred to two Sandpoint attorneys "judged in contempt of a District Court decision and order concerning their handling of the guardianship". Although Bandelin

was later judged in contempt by the District Court, at the time these accounts were written, his case had not yet come to trial and, hence, he had not yet been adjudged in contempt. Susequent issues of the newspaper dealt with the new developments in the court cases as they occurred and did not contain any erroneous statements regarding Bandelin.

ARGUMENT

THIS CASE SHOULD NOT BE REVIEWED BY THE SUPREME COURT

I.

THE SUPREME COURT OF IDAHO HAS DECIDED THIS CASE STRICTLY IN ACCORDANCE WITH THE GUIDELINES LAID DOWN BY THE U. S. SUPREME COURT IN GERTZ V. WELCH.

In deciding this case, the Idaho Supreme Court carefully reviewed the decisions in New York Times v. Sullivan, 376 U.S. 254 and its progeny, especially Gertz v. Welch, 418 U.S. 323, which described the basis for determining when a person is a public figure in libel cases. The Idaho Court stated (pages 20, 21 and 22 of Petitioner's brief):

> "The United States Supreme Court in Gertz said that the designation of a public figure may rest on two alternative bases:
>
> " 'In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all

purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.' 418 U.S. at 351.

"A review of the record reveals that Bandelin was prominent in the local politics of Bonner County, had been a representative in the State Legislature, was a leading attorney, and was well known throughout the county. Counsel for Bandelin argues, however, that in recent years Bandelin's public role has subsided–that he has reverted to the 'simple small-town lawyer he was before he gained notoriety'. We concede that a public figure can revert back to the 'lawful and unexciting life lead by the great bulk of the community'. Prosser, Law of Torts, at 107 (1st ed. 1941.) But it is far more common that a public figure will retain residual elements of his former status even when he returns to private life.

"However, we do not affirm the District Court's decision exclusively on the prominence that Bandelin enjoyed in the local community. We are sensitive to the consequences of being a public figure and we do not assume that a citizen's participation in community and professional affairs automatically renders him a public figure. We follow the approach of the Supreme Court in Gertz:

" 'It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation (or invasion of privacy)'.' 418 U.S. at 352.

"In the present case, Bandelin as the guardian of the estate of Murial I. Talbot was the center of the controversy that gave rise to the Sandpoint News-Bulletin's publications. The Sandpoint News-Bulletin initiated its coverage of the Talbot case when it became aware of the trial judge's criticism of Bandelin's handling of the Talbot guardianship. Under such circumstances, Bandelin cannot maintain that he is not a public figure and was just an attorney handling the probate affairs of a client. He was rather the Court appointed guardian, a pivotal figure in the controversy regarding the accounting of the estate that gave rise to the defamation and invasion of privacy actions."

Judge Towles, in his Memorandum Decision, had said that a guardianship is one of the highest fiduciary duties authorized by the statutes of the state and that Bandelin had violated those duties. The newspaper's exposure of those violations to public view was in the public interest. Also this was a matter of local concern and the publication was in a local newspaper.

II.

THE IDAHO COURT HAS UPHELD THE FIRST AMENDMENT

Since the Idaho Courts have upheld the first amendment declaring that the publications were privileged, we believe there is no need for Supreme Court review. The Court has said in Gertz that the states, so long as they do not impose liability without fault, may define for themselves the appropriate standards of liability for a publisher of defamatory falsehood injurious to a private individual. Therefore, the states could require proof of actual malice in all cases if they wished. Hence, the Supreme Court should not be concerned if the states apply first amendment protection for publications concerning public officials or public figures more broadly than the Supreme Court requires. There is a need for Supreme Court review only if there is a possibility the state has failed to provide constitutional protection when required.

III.

NO ISSUE OF MATERIAL FACT WAS PRESENTED

The Trial Court and the Idaho Supreme Court both found that no issue of material fact was presented by the affidavits and depositions. First, the Trial Court found that Bandelin was both a public official as a court appointed guardian and a public figure.

> "It is for the trial judge, in the first instance, to determine whether the proofs show (plaintiff) to be a 'public official'." Rosenblatt v. Baer 383 U.S. 75 at page 87.

Then the Trial Court determined that plaintiff was not able to establish actual malice with convincing clarity as required by New York Times and granted Summary Judgment. This was affirmed by the Idaho Supreme Court. Both Courts relied strongly upon Time, Inc. v. Pate 401 U.S. 279 which held that a reporter's rational interpretation of an ambiguous document is constitutionally protected when the test is whether the publisher acted in reckless disregard of the truth. Time, Inc. v. Firestone 424 U.S. 448 did not disagree. See footnote 4 of that opinion.

Petitioner urges that a jury should have been allowed to consider the repetitious nature of the publications, along with the tone of the publications to determine whether there was actual malice. The Court correctly held that such matters did not establish malice with convincing clarity. We submit that neither repetition nor the tone of the publications can show knowledge of falsity or reckless disregard of the truth.

Petitioner contends that the reporter's veracity as a witness was challenged by a contradictory affidavit from one of his alleged sources thus raising an issue of fact requiring a jury trial. This same point

was determined adversely to petitioner in both Courts below and is not a matter requiring review in this Court as it raises no constitutional issue. Furthermore, the contradictory affidavits dealt with the reporter's source for the statement that the Talbot case was "puzzling" and that the legal community was "shaken". These words were entirely non-defamatory and the reporter's reasons for using them are immaterial.

Respondent's affidavits and depositions showing lack of knowledge of falsity and no reckless disregard of truth with respect to the only false statements published were entirely uncontroverted and, therefore, Summary Judgment was required.

Time, Inc. v. McLaney 406 F.2d 565
Cert. Den. 395 U.S. 922
Washington Post v. Keogh 365 F.2d 965
Cert. Den. 385 U.S. 1011
Belli v. Curtis Publishing Company
25 Coll.App.3d 384

CONCLUSION

No new, novel, or different question of law is presented by this case. It falls well within the guidelines set forth by this Court in Gertz and was decided in accordance with those guidelines.

The State Courts have decided that no issue of material fact exists. The Supreme Court is not required to review such a decision.

Respectfully submitted,
HULL, HULL & WHEELER
HAMBLEN, GILBERT & BROOKE, P.S.
By Fred W. Gilbert

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